

AMERICAN ARBITRATION ASSOCIATION

PAUL ARMBRUSTER,	)	
	)	
Claimant,	)	
	)	
vs.	)	Arbitration Case No. 01-16-0003-4446
	)	
T-MOBILE USA, INC.	)	<b>T-MOBILE USA, INC.’S MOTION FOR</b>
	)	<b>SUMMARY JUDGMENT</b>
Respondent.	)	
_____	)	

**T-MOBILE USA, INC.’S  
MOTION FOR SUMMARY JUDGMENT**

**I. INTRODUCTION**

The entirety of this action is based upon communications that the Federal Communications Commission (“FCC”) and federal courts have unambiguously and repeatedly confirmed are exempt from Telephone Consumer Protection Act (“TCPA”) liability. Claimant Paul Armbruster (“Claimant”) is a T-Mobile customer and complains in this arbitration about text messages he received from T-Mobile on his T-Mobile device about his T-Mobile service. There is no dispute that Claimant was not charged for any of the alleged text messages. Beyond the facial absurdity of Plaintiff’s complaint, the FCC has expressly exempted from TCPA liability communications – and specifically text messages – made by a wireless carrier to its customers for which the customer is not charged. Moreover, the FCC has expressly stated that consent is not needed to send such communications. T-Mobile is not liable as a matter of law and therefore T-Mobile’s Motion for Summary Judgment should be granted.

## **II. BRIEF STATEMENT OF FACTS**

Claimant purchased a cellular telephone and activated a T-Mobile line of service on March 17, 2015. Claimant signed a T-Mobile service agreement, which referenced T-Mobile's November 10, 2014 Terms and Conditions that were in effect at that time. The Terms and Conditions explicitly state the following:

**16. \* Notices and Customer Communications.** You expressly consent to be contacted, by T-Mobile or anyone calling on its behalf, for any and all purposes, at any telephone number, or physical or electronic address where you may be reached, including any wireless telephone number. You agree that T-Mobile may contact you in any way, including, pre-recorded or artificial voice or text messages delivered by an automatic telephone dialing system, or e-mail messages delivered by an automatic e-mailing system. You agree that we also have the consent to contact any authorized users on your account in any manner set forth in this Section. You expressly acknowledge that this consent cannot be revoked without prior written agreement and acceptance by us.

Claimant claims that he has received and continues to receive text messages from T-Mobile on his T-Mobile device.

Claimant is an active T-Mobile customer and has been since he activated his service on March 17, 2015. [Declaration of Christopher Muzio, ¶ 2.] All of the text messages at issue that T-Mobile sent to Claimant's phone were sent while Claimant was a T-Mobile subscriber and Claimant was never charged for any of the text messages at issue in this arbitration. [*Id.*, ¶ 3.]

## **III. CLAIMANT'S CLAIMS FAIL AS A MATTER OF LAW BECAUSE ALL OF THE TEXT MESSAGES AT ISSUE FALL WITHIN THE TCPA WIRELESS CARRIER EXEMPTION**

The TCPA prohibits "any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice . . . to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other

radio common carrier service, or any service for which the called party is charged for the call.” 47 U.S.C. § 227(b)(1)(A)(iii). When Congress enacted the TCPA, it instructed that the FCC “may, by rule or order, exempt from the requirements of paragraph (1)(A)(iii) of this subsection calls to a telephone number assigned to a cellular telephone service that are not charged to the called party, subject to such conditions as the Commission may prescribe as necessary in the interest of the privacy rights this section is intended to protect.” 47 U.S.C. § 227(b)(2)(C).

**a. The FCC Expressly Exempts from TCPA Liability Communications from a Wireless Carrier to its Customers for Which the Customers Are Not Charged.**

Consistent with its authority granted by Congress, the FCC expressly exempted from TCPA liability calls made by a wireless carrier to its customers for which the customer is not charged. *See* 7 FCC Rcd. 8752, 8775 (1992); 47 U.S.C.A. § 227(b)(2)(C) (permitting the FCC to promulgate an exemption for calls for which the cellular called party is not charged); *O’Connor v. Diversified Consultants, Inc.*, No. 4:11CV 1722 RWS, 2013 WL 2319342, at \*4 (E.D. Mo. May 28, 2013). In promulgating the exemption, the FCC responded to a number of comments seeking exemption:

The Cellular Telecommunications Industry Association (CTIA) and Centel Corporation urge the Commission to exempt from the prohibitions on autodialers and prerecorded messages those calls made by cellular carriers to cellular subscribers (as part of the subscriber’s service) for which the called party is not charged. These commenters point out that cellular customers are not charged for calls which, for example, monitor service or issue warnings to “roamers” that they are moving out of the carrier’s service area. Therefore, such calls should either be exempted from the prohibitions of § 64.1200(a)(1)(iii), or should be interpreted as not intended to be prohibited by Congress.

7 FCC Rcd. 8752, 8775 (1992). The FCC granted the commenters the clarification they were seeking and went even further, stating that:

[N]either [the] TCPA nor the legislative history indicates that Congress intended to impede communications between radio common carriers and their customers regarding the delivery of customer services by barring calls to cellular subscribers for which the subscriber is not called [sic]. Accordingly, cellular carriers need not obtain additional consent from their cellular subscribers prior to initiating autodialer and artificial and prerecorded message calls for which the cellular subscriber is not charged.

*Id.* The exemption created by the FCC is broad. On its face, it applies to any calls or messages from a cellular carrier to its subscribers for which the cellular subscriber is not charged regardless of the purpose or type of call.

#### **b. The FCC Reaffirms the Exemption.**

In 2012, the FCC undertook another major rulemaking process and revised certain rules under the TCPA. As part of that process, certain parties urged the Commission to clarify that, if new rules are adopted, calls and messages from wireless carriers to their own customers will continue to be exempt from the TCPA if the recipient is not charged. In response, the FCC reiterated that the wireless carrier exemption exists and confirmed that it applies to telemarketing calls and texts:

While the Commission adopts rules to protect consumers from unwanted telemarketing robocalls, it leaves undisturbed the regulatory framework for certain categories of calls. Specifically, consistent with section 227(b)(2)(C) of the Act and its implementing rules and orders, **the Commission does not require prior written consent for calls made to a wireless customer by his or her wireless carrier if the customer is not charged . . . .** [T]he Commission addressed this issue in the 1992 TCPA Order . . . by concluding that Congress did not intend to prohibit autodialed or prerecorded message calls by a wireless carrier to its customer when the customer is not charged. The Commission based its conclusion on the fact that **neither the TCPA nor its legislative history indicates that Congress intended to impede communications between common carriers and their customers regarding the delivery of customer services by barring calls to wireless consumers for which the consumer is not charged.** Nothing in the record or the Commission's analysis of consumer complaints provides it a reason to alter its finding.

*Id.* (emphasis added).

Every single text message that Claimant claims violates the TCPA in this action was sent to Claimant's T-Mobile device while Claimant was a T-Mobile subscriber. Moreover, Claimant has not been charged for any those messages. All of the text messages at issue therefore fall squarely within the wireless carrier exemption, and thus do not (and could not) violate the TCPA as a matter of law. Moreover, although Claimant did consent to receiving these messages, consent is nevertheless irrelevant to the wireless carrier exemption inquiry. Simply, consent is not needed for such communications. The FCC has made it clear that text messages between T-Mobile and its customers for which the consumer is not charged do not fall within the scope of the TCPA and therefore T-Mobile is not liable under the TCPA as a matter of law.

**c. Courts Regularly Apply the Wireless Carrier Exemption**

Courts have consistently recognized the wireless carrier exemption. As one court has held, “[t]he FCC has established that cellular carriers need not get permission to autodial their subscribers where no charge is incurred.” *O’Connor v. Diversified Consultants, Inc.*, No. 4:11CV 1722 RWS, 2013 WL 2319342 (E.D. Mo. May 28, 2013). Indeed, every court to address the issue has acknowledged the fact that calls or messages from a wireless carrier to its customers do not violate the TCPA. *See Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242, 1257 (11th Cir. 2014) (finding that the FCC “intended to exempt only ‘communications between radio common carriers and their customers’ with regard to autodialed calls for which the subscriber is not charged”); *Page v. Regions Bank*, 917 F. Supp. 2d 1214, 1221 (N.D. Ala. 2012); *Lozano v. Twentieth Century Fox Film Corp.*, 702 F. Supp. 2d 999, 1009 (N.D. Ill. 2010). There can be no reasonable debate that the messages at issue in this case are exempt from the TCPA. Accordingly,

T-Mobile is not liable under the TCPA as a matter of law, and Claimant's claims should be dismissed.

#### **IV. CONCLUSION**

T-Mobile respectfully requests that the American Arbitration Association grant its Motion for Summary Judgment.

This 21st day of November, 2016.

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Attorneys for T-Mobile USA, Inc.

**CERTIFICATE OF SERVICE**

This is to certify that I have this date served a copy of the foregoing **T-MOBILE USA, INC.'S MOTION FOR SUMMARY JUDGMENT** upon Claimant and AAA via email to the following addresses:

Claimant: 13thplaceconsulting@gmail.com  
AAA: ProSeMADR@adr.org

This 21st day of November, 2016.

/s/ Lisa Garcia  
LISA GARCIA